In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 387

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, MONTANA, PETITIONERS

v.

R. E. NORDWICK, EXECUTOR OF THE WILL AND ESTATE OF ARTHUR L. NORDWICK, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

By order of October 9, 1967, the Solicitor General was invited to express the views of the United States with respect to this case.

This suit was brought by petitioners, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservations to determine their rights to oil and gas underlying two tracts, one of 160 acres and the other of 80 acres, which had once formed part of the Reservation lands. The defendant (respondent here) is the estate of a homesteader who acquired the tracts after the unallotted lands of the former Reservation were opened for entry by the Act of May 30, 1908, 35

282-818—67

Stat. 558—which authorized the allotment of parcels to the individual members of the Tribes and provided that the remainder should be sold by the United States, for the account of the Indians, "under the general provisions of the homestead, desert-land, mineral, and town-site laws." § 7 of the Act (Pet. A11–A12). The title of the homesteader is not disputed, but the Tribes claim the minerals under an Act of March 3, 1927, 44 Stat. 1401, which amended the Act of 1908 "by specifically reserving to the Indians having tribal rights on said reservation the oil and gas in the tribal lands undisposed of on the date of the approval of this Act" (Pet. A14–A15). The validity of the Indians' claim to the minerals underlying the smaller tract is no longer in controversy—the entry having been filed more than two years after the 1927 Act became effective. The remaining issue is whether or not the courts below were correct in rejecting their claim with respect to the 160-acre tract on the ground that the homesteader's entry, initiated before 1927 but perfected several years after the new statute, amounted to a "disposition" of the land which would render the 1927 Act inapplicable.

The question is not without difficulty. The opinion of Judge Browning for the court of appeals very clearly sets out the considerations on either side (Pet. A3–A9) and it would serve no purpose to repeat them here.[1] In the court below, the United States, upon

[1] We note, however, that the opinion below appears erroneously to assume that homesteaders in Nordwick's position might have had a legitimate "expectation" before 1927 that oil and gas rights would ultimately be patented to them (Pet. A9). The fact is that, then as now, known minerals are excluded from patents

invitation, supported the construction of the 1927 Act contended for by the Indians and we adhere to that view. On the other hand, we recognize that the issue is close, and that, in light of intervening administrative action with respect to at least 157 other parcels[2]—many doubtless now held by innocent third-party purchasers—such a ruling would be seriously disruptive. See *Logan* v. *Davis*, 233 U.S. 613, 627. Moreover, although substantial acreage already patented is affected, the question is not of recurring importance for the future. In the circumstances, the United States—accepting the ultimate ruling in this case as controlling its action—is willing to acquiesce in the decision below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

---

issued to homesteaders. See 30 U.S.C. 121; 43 U.S.C. 201. Indeed, like other homesteaders, Nordwick, in making final proof in 1929, expressly represented that there were no indications of minerals of any kind on the land (Pl. Ex. 21).

[2] Apparently, 157 patents which do not reserve oil and gas rights have been issued for Fort Peck Reservation lands to homesteaders who, like Nordwick, filed their entries before 1927 but perfected them only in later years. The court below noted that the reservation of the oil and gas deposit in the original Nordwick patent may have resulted from a clerical error because it covered both the 160-acre tract at issue here and the 80-acre tract with respect to which he had signed a consent to the reservation of oil and gas deposit (Pet. A7–A8).

U.S. GOVERNMENT PRINTING OFFICE: 1967